United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7649

United States Court of Appeals
FOR THE SECOND CIRCUIT

MARVIN STERN,

Plaintiff-Appellee
and
Cross-Appellant,

against

SATRA CORPORATION and SATRA CONSULTANT CORPORATION,

Defendants-Appellants
and
Cross-Appellees.

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF PLAINTIFF-CROSS-APPELLANT MARVIN STERN

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Preliminary Statement

Marvin Stern, plaintiff and cross-appellant, submits this brief in reply to the responding brief of Satra (defendants and cross-appellees Satra Corporation and Satra Consultant Corporation) on only those points raised on the cross-appeal, *i.e.*

—whether the District Court erred in determining that the $16,667 and $9,350 monthly payments made to Satra by IBM under a 1973 agreement between them did not constitute "retainers" under the contract between Stern and Satra; and

—whether the District Court erred in determining, without supporting evidence, that a mitigation factor was properly applicable to the facts in this case, and if so in setting a percentage figure thereon.

ARGUMENT

POINT I

REPLYING TO SATRA'S POINT I

THE DISTRICT COURT ERRED IN FINDING THAT THE MONTHLY PAYMENTS FROM IBM TO SATRA UNDER THE 1973 AGREEMENT DID NOT CONSTITUTE "RETAINERS."

It is undisputed that after weeks of negotiation concerning the basis of a business relationship between them, Satra and Stern finally, on September 1, 1971, entered into what was, in effect, a compromise arrangement. Successfully pushed away from any salary plus percentages, successfully worn down by the attrition of consistently downward renegotiations, Stern finally agreed to a joint-venture contract based on 50% of Satra's earnings from two corporations which Stern expected to bring to Satra. These earnings were divided into two categories, the first of which was subject to a deduction for expenses, the second, denominated as "retainers", was not.

Not then knowing whether these corporations would ever become Satra clients and what, if any, earnings would result therefrom, Satra was freed from paying any salary to Stern and committed itself only to a percentage of its *contingent* earnings. Oztemel, Satra's chief executive officer, had prompted Stern: "I hope you take the 50/50 partnership with no financing by Satra" (157A). Stern, pinning his financial future on the contingency, agreed

with one exception which was added to the agreement by Oztemel in script, before signing the same: any *retainers* from IBM or Stromberg-Carlson would be divided equally, all other income would be so divided after the scheduled deductions in lieu of expenses (E 9) . It was stressed and agreed upon from the beginning, that *advances* against commissions would be included as "retainers" (222-223A, 708A, 1052-1053A); and Satra did in fact so treat the original advance (243-244A).

A. Stern's Need for Current On-Going Income.

Stern's efforts on behalf of Satra, and Satra's seeming abilities to fulfill the expectations thus aroused, resulted in an agreement between Satra and IBM, but not with Stromberg-Carlson.

All during the period beginning in June 1971 and culminating with IBM's Agreement with Satra on September 21, 1971, Stern had worked steadily, and against great odds, in bringing the same to pass. All during that period, he had not been paid by Satra. Further, Stern had worked for Satra, since April 1971, on the Kama River project, and had been paid therefor only half of his time-schedule fees, despite an agreement to the contrary and the eventual realization of a number of important Kama River export licenses (*See* Stern's Main Brief at 6-7; *see also* 287-292A, 300-307A, 387A, 549-550A, 545-549A, 629-630A, 684-687A, 801-802A, 812-814A, 839-841A).

The net result was that Stern had spent considerable time and labor, and incurred considerable expenses, on behalf of Satra and had secured payment for only one month's work. He was then engaged in working on the IBM and Stromberg-Carlson deals, both highly speculative ventures that might take a long time to materialize. It was clearly important to Stern that he find a source of current, on-going, income.

Should the Satra-IBM agreement be signed it was still clear that considerable further time might pass before IBM could enter the Soviet market, assess its varied computer needs, negotiate sales, and secure approvals of the United States Commerce Department for exporting the negotiated goods to Russia.

Stern knew that this would not do: he needed on-going current income. And it was with this in mind that Stern asked Oztemel to exclude "retainer" income from the expense schedule deductions, which deductions would then apply to commission income only (158-159A). Stern was most specific in his discussion with Oztemel. He did not say he needed $\$x$ immediately to pay some bills or to relocate his family: he said he needed income on which to live (708A), or as Satra itself has described it (Satra's Main Brief at 10) "current income for living purposes", and that could *only* mean on-going recurring income.

The District Court's interpretation that "retainer" income meant "cash on the barrelhead" was based solely on its understanding that Stern needed *immediate* funds for the "required move from California, where he then resided, to New York" (30A). But that was *never* the case; Stern never intended to move to New York, and so indicated on direct examination (163A):

> "Q. Was it your plan to move from Los Angeles to New York? A. No it was not.
> Q. Your family was to remain in Los Angeles? A. Yes."

And, on cross-examination concerning his intentions, he stated (320A):

> "A. We discussed the fact that my family and I have come to a firm decision we are not going to relocate the kids and things like that. So that I would have a heavy expense travelling back and

> forth. I would have an apartment here, and those would be expensive. We discussed that I would need some reasonable salary over and above those kinds of expenses."*

And, again on cross-examination, Stern said (324A):

> "Q. What was the conversation? A. Mr. Oztemel said wouldn't I move east for a hundred thousand dollars a year."
>
> "Q. What did you say to that, sir? A. I explained that we had reached a family decision to stop moving the family around so much. My kids were in school, they liked it, they were doing academically well, and these are things other than money. So I was not excited about moving east, even for a hundred thousand dollars a year."

There is *no* contradictory evidence in the record.

Since Judge Lasker's interpretation of "retainer" income was based on his finding that Stern needed immediate cash to facilitate his move to New York (a finding completely without support in the record), the District Court was clearly in error. What Stern wanted, and what he *said* he wanted, was current income. And what he meant by that and all that anybody ever means by that, is not a one-time payment but current, periodic, income.

Satra now disputes the meaning of "retainers", *i.e.* those sums which were not to be subject to the scheduled deductions. Satra maintains that "retainers" means "cash-on-the barrelhead" and not on-going, recurring income. But, if this were the case, Satra would not have conceded that the "retainer" exception was to provide Stern with "income to support himself and his family . . . current income for living purposes" (Satra's Main Brief at 10). If this were the

*The Satra proposal accepted by Stern made no provision for any salary, and the "retainer" exception was in lieu thereof (222-223A, 708A, 1052-1053A).

case, Satra would have disputed that the straight 50% division without deduction was applicable to the second $25,000 payment for IBM and not only to the inital $25,000 IBM payment.

Thus, knowing what Stern meant by current-income and retainers, it becomes imperative to know what Satra understood "retainer" income to mean.

B. Satra Understood the Word "Retainer" to Mean Recurring Periodic Payments.

It was the usual business practice of Satra to enter into retainer arrangements with its clients. Its retainer contracts, contemplating monthly, quarterly or other periodic compensation, ran up to $300,000 per annum and was in addition to commissions contingent on sales (Oztemel 55A; Giffen E 61-63).

It was based on such business dealings that the first money talk between Satra and IBM was conducted by Stern with the latter's Eastern European director, Ralph Stafford (214-215A). Stern suggested then that IBM agree to a retainer arrangement (218A), that is, that IBM would pay periodic sums to Satra. IBM, however, asserted that it was used to working on a commission basis. Rather than to imperil, even slightly, any potential contract with IBM, Stern immediately agreed but suggested that a *nominal* retainer to evidence good faith, even if same had to be treated as an advance against future commissions, would be in order (218A).

James Giffen, the vice president of Satra, too, clearly recollected that Satra had considered charging "a fairly large retainer fee, or annual fee or semi-annual fee to IBM. . . ." (563A).

> "We didn't at that time have a clear idea of what it was we thought we could charge. I believe we discussed fees ranging from $100,000 to $500,000 per

> year. At one point I believe we discussed $250,000 per year. We also discussed adopting a sliding scale fee . . . With regard to the commissions we felt that we should charge a percentage on all—the gross amount of all sales that IBM made in the market." *Ibid.*

Clearly, just from these quotes and without further investigation of the usual retainer contracts used by Satra, it is clear what Satra understood the word "retainer" to mean: on-going, recurring, periodic payments.*

C. The IBM Monthly Payments Made to Satra Under the 1973 IBM Agreement Were Understood by IBM to Constitute Retainers.

The 1971 IBM Agreement provided for percentage commissions to Satra on all IBM products sold to the Soviet Union. These commissions were to recompense Satra for all services rendered to IBM, administrative, consultative and financial (Exhibits I, J and K, E 25-38) excepting that IBM would reimburse Satra directly for all Satra's out-of-pocket expenses. And so IBM testified at the trial (993-994A). The two $25,000 advances made by IBM to Satra in 1971 were, in reality, advances expected to be paid as commissions on the sale of equipment to the Chemical Ministry in the Soviet Union (994A). This sale to the

* Satra contends (Satra's Answering Brief, ftn at 17) that Stern's Main Brief improperly quoted Oztemel's statement concerning the "retainer" exception as having been added to the contract since the "reimbursement schedule really is logically associated with expenses on sales and future commissions *not current on-going payments*". The emphasized phrase should *not* have been included. The added phrase was intended as a summary of Oztemel's next quoted sentence: "There should not be any expense reimbursement applicable to the current income like the retainers". Apology is made for this error—but there is nothing to support Satra's argument that the meaning of these two statements, in the context, is other than as here interpreted or that it supports Satra's insistence that "current" means "immediate".

Chemistry Ministry was eventually approved by the Commerce Department, and an export license was issued (984A).

These payments were advances against commissions and were considered as "retainers". When this question was first raised, just prior to IBM's signing its agreement with Satra, Satra's treasurer, Max Schloss, had assured Stern that the advances against commissions from IBM would be treated "as retainers". Stern so testified (222-223A) and was never contradicted on the record, even though Mr. Schloss' attendance at the trial was announced (715A). These were the "nominal retainers" which Stafford and Stern had discussed and which were in no event returnable if the sale had not gone through (which it, however, did); and these were retainers which Satra *admittedly* contemplated as such by payment of 50% of the first thereof to Stern without any of the scheduled deductions. Thus, *advances* against future income were clearly regarded as "retainers", by both Satra and IBM.

In 1973, IBM and Satra renegotiated their contract—and entered into a new agreement to "replace", as Oztemel said (E 94), the existing agreement. In the new agreement, IBM was to pay Satra certain monthly fees. These fees were in two categories:

> 1. First there were payments to be made of $9,350 per month as *advance against commissions* expected to be earned by Satra on approval of an export license for a $10.5 million sale negotiated with Intourist in the Soviet Union (990A). To the extent that these $9,350 payments are advances against commissions on the contemplated Intourist sale, these payments are no different than the two $25,000 payments IBM made to Satra under the 1971 Agreement as advances on the Chemical Ministry sale. These $25,000 payments were denominated by Stern and by IBM's Stafford as "nominal retainers". These

were the payments Satra clearly considered as *retainers* when it paid to Stern 50% thereof, *without deduction*, pursuant to its agreement with Stern.* Thus, for the same reasons that even Satra conceded that advances against commissions for the sale to the Chemical Ministry were "retainers", it logically follows that advances against commissions for the sale to Intourist are retainers.**

2. Second, there were payments to be made of $16,667 per month as an "all-inclusive fee" (999A) for administrative services (E 39ff). These "all-inclusive" monthly fees were considered by IBM to constitute "retainers". As Bert Witham, IBM's vice president of finance, testified:

> "I could have called it a *retainer fee*. Its an all-inclusive fee as far as I'm concerned, to pay for services that we anticipated asking Satra Corporation to provide to us" (1001A; emphasis added).

These fees are not based on any expenses necessarily incurred by Satra—which expenses would be reimbursed by IBM, but merely to safeguard to IBM the continuing availability of Satra's services, *i.e.* a retainer. IBM had preferred to pay for these services at cost-plus (*i.e.* documented costs plus a 20% profit override), but Satra did not agree thereto (998-999A). IBM, therefore, never went into the costs that Satra *might* incur in servicing IBM (1001A), but merely determined on an all-inclusive fee which was, as IBM's Bert Witham stated, never "scientifically arrived at through any mathematical formula" (990A). It is clear that Satra's actual expenses were

* Satra terminated its contract with Stern prior, however, to making the second such payment.

** Unlike the 1971 payments, however, the $9,350 commission payments are refundable to IBM should no export license issue. To that extent, all payments to Satra, and Stern's share thereof, are returnable. The District Court judgment recognized this by providing that Stern's share of these payments be put into an escrow account.

never proved despite much talk in Satra's briefs as to its considerable expenses.*

D. The Logic of Retainers.

The Stern-Satra agreement preceded by one month the IBM-Satra agreement. At the time it was entered into, there was only an expectation that Satra would enter into any agreement either with IBM or Stromberg-Carlson; and of those two only the former in actuality did eventuate.

As has been seen, Satra's client contracts usually contained provisions for retainers and commissions. Giffen testified that such retainers from IBM were hoped to range anywhere from $100,000 to $500,000 per year (563A). These retainers were contemplated as being *over and above* commissions (*ibid*). In fact, if the policy of "detente" had worked as expected by IBM, its sales to the Soviet Union through 1972 were expected to reach some $271 million of which Satra's commission income would consist of $9.5 million—and this (as was noted in Stern's Main Brief at 20-21) was accordng to the testimony of IBM's vice president in charge of finance (992A, 996A).

Thus, when Oztemel agreed to let Stern have 50% of all *retainers* without expense deduction, he was doing so in expectation of those enormous commissions and with an

*Satra's Main Brief (ftn at 9) mentions repeatedly that $400,000 was expended by Satra in the first two years it serviced that account. Satra never proved this point: it puts its accountant on the stand with a chart prepared by its lawyer and the District Court ruled this offer of proof inadmissible (957Aff). The amounts Satra expended, however, were never put into evidence as such since they were immaterial: there was a schedule of deductions in lieu of expenses. Further, there was no examination or cross-examination on the figures submitted by Satra, or any "best evidence" as concerns its summary statements. In addition there was no inquiry made as to allocation of general Satra expenses to IBM and other clients or investigation as to expenses incurred which were reimbursed. Thus for Satra to insist on its "actual expenses" in servicing IBM is clearly beyond the scope of the evidence, the proof, and the facts in litigation.

arbitrary expense schedule that would liberally reimburse Satra before giving Stern his percentage. Further Oztemel had been successful in converting any obligation to pay a salary to Stern for his efforts to a contingent obligation to pay Stern a percentage.*

It was not until *after* Stern had finally reached his agreement with Satra, that the people from IBM made it clear that IBM would not enter into a retainer agreement with Satra, being used to dealing on a straight commission basis, but that for "good faith" reasons would make an exception as to a "nominal retainer." This "nominal retainer" consisted of the first two $25,000 payments made as an advance against future commissions. Clearly, these arrangements which were actually negotiated by Stern, were to *his disadvantage:* for while Stern expected to get a straight 50% of these advances or nominal retainers, he saw himself losing the expenctancy of a straight 50% of the very large (anywhere from $100,000 to $500,000 per annum) retainers then expected by Satra.

Nevertheless, Stern made no complaint or attempt to renegotiate his contract with Satra, but hoped with Satra that the commissions would come in—all of which were *in futuro* and dependent on negotiations, sales contracts, and approval of export licenses. Satra's insistence (Satra's Answering Brief at 17) that the retainer clause was

> "never intended to apply to actual commission payments, or to payments for services rendered when there was no other source of future commission income against which the Expense Schedule would apply"

is clearly an *ex post facto* rationalization.

* *I.e.* "jam tomorrow" as the Red Queen said. (*See* Stern's Main Brief ftn. at 13).

The fact is that neither Stern nor Satra knew how the IBM contract would read, *if* it was ever made. Each took a chance. As to the first two years, that is under the 1971 IBM Agreement, Satra would have benefited because there were no great retainers. As to the 1973 IBM Agreement, however, monthly retainers came into being. Satra now wants to change the clear language of its contract with Stern because to do so is to *its* benefit.

Further, Satra complains about its enormous expenses and claims that to read the contract as written would, on reconsideration, be unfair to it (Satra's Main Brief at 23-26). However, as to these expenses, as is discussed *supra* (ftn. at p. 10) there was NO PROOF, since none was put into evidence and would, in any event, have been irrelevant.*

Further, expenses were always considered in terms of the switch-and-barter deals, and not for general overhead. At the outset of the IBM arrangements, financing problems and switch-and-barter deals were thought to be the major areas of Satra's assistance to IBM (212-214A), 655-656A, 981-982A). Thus, "[i]t was perfectly reasonable not to have the expense schedule applicable to retainers or things like that because really these were expenses to be incurred on the barters and financings. . . ." (1083A).

Satra was to arrange for the unique financial transactions contemplated in switch-and-barter deals (1971 Agreement Par. 1H, E 28). There is still the possibility that Satra could earn significant commission income on switch-and-barter deals if the Soviets find it necessary to pay for approved imports by commodity-exchange because of a hard-currency shortage. The 1973 IBM Agreement provides that Satra has a right of first-refusal for all IBM's future switch-and-barter deals with the Soviet Union (988-

* For Satra to refer to the contents of this schedule as "proof" or "fact" is highly improper. See ftn. at p. 10 *supra*.

989A, 992-993A; 1973 IBM Agreement, E 39ff). Thus, Satra might still realize considerable commission income; —the possibility remains, and the probability, as always, depends on "detente".

E. Conclusion

From the above it should be clear that the consideration provided from IBM under the 1973 IBM Agreement was in terms of "retainers"—and since Stern was to receive 50% of retainer income *without* deduction, Stern should receive a straight 50% of all the $9,350 and $16,667 monthly retainer fees.

POINT II

REPLYING TO SATRA'S POINT IV

MITIGATION OF DAMAGE PRINCIPLES IS INAPPLICABLE TO THE INSTANT CASE, AND EVEN IF APPLICABLE, SATRA HAS NOT SUSTAINED ITS BURDEN OF PROVING SAME OR THE EXTENT THEREOf.

A. The Stern-Satra Agreement Is Not an Employment Agreement.

Satra's entire argument as concerns mitigation apparently rests on the assumption that the agreement between it and Stern was an employment agreement. That however is clearly not the case; the agreement is a joint-venture agreement.

All joint-venture agreements envisage joint efforts of one kind or another toward a particular end. The end in the Stern-Satra agreement was for Stern to procure IBM and possibly Stromberg-Carlson as Satra clients for entrée into the Soviet market, and for Satra to service these clients, to the extent necessary and possible, to keep their

business and help them consummate sales to the Soviet Union on which their payment to Satra, by retainer, commission or other financial consideration, would ensue.

Subsequent to the Stern-Satra agreement, IBM was secured as a Satra client, Stromberg-Carlson was not. Stern had worked enormously hard, and against all predictions at Satra, in helping to realize this relationship. Stern stood ready to help further the relationship as might be necessary. Further help was *not* necessary. According to Oztemel there was no further performance required of Stern after the deal was made, or "at that time" (438A, 771A). In fact, in an internal Satra memorandum sent from Giffen to Stern on September 9, 1971, even prior to the contract date with IBM, there was set forth an outline of the various services that were thought necessary from Satra to IBM (Exhibit KK, E 60). When asked about this memorandum, Oztemel testified that *none* of the services requested of Satra by IBM was to be performed by Stern (773A). And on September 8, 1971, Klaus Hendricks, Stafford's counterpart in IBM's New York office, sent a memo to Bert Witham setting forth the results of a conference he and Stafford had had with Satra, and the services Satra could perform for IBM (Exhibit JJ, E 57ff). None of these services was to be performed by Stern, as Oztemel finally admitted (779-782A). Further IBM's contract insisted on the continued need for Oztemel's services, not Stern's (Exhibits H, I, L and MM at E 16-34, 40-46, 65-66; and 231A, 661A, 772A).

The language of the Stern-Satra agreement provided that Stern was to "devote such time necessary to service the agreement" (Exhibit C, Par. I-B, E 7). The language used by Satra in its attempt to provide a more "formal" agreement was even less demanding as to the services

Stern was to perform. This proffered draft (Exhibit X, E 47ff) recited that:

> "WHEREAS, Marvin Stern . . . *has been* active and instrumental in presenting the possibility that Satra or its subsidiaries may represent International Business Machines Corporation (hereinafter called 'IBM') and Stromberg-Carlson (hereinafter called 'Stromberg') in trade with several trade agencies of the Soviet Union, . . .
>
> * * *
>
> "NOW, THEREFORE, it is hereby agreed that
>
> I
>
> "Stern *shall be entitled* to the following compensation from Satra . . .
>
> * * *
>
> II
>
> ". . . This agreement shall be deemed to continue for the renewal term of the agreements between Satra and IBM and Stromberg, provided Stern *devotes such time as may be necessary* to service such agreements *during any renewal term*" (emphasis added).

There was very little servicing for Stern to accomplish once the IBM agreement was made. In fact, after signature by IBM, Satra almost went out of its way in keeping Stern away from the Soviet Union and away from IBM (423-427A, 579A, 580-581A). Stern had envisaged that he could render certain services (210A, 362-363A, 792-793A, 859-861A), but Satra made no such call on him. In fact, Oztemel said that after Stern was no longer involved with Satra and the IBM contract, no one had to take over

Stern's job in servicing IBM. More precisely, Oztemel said (728-729A):

> "To the best of my recollection, there was nothing to take over from Dr. Stern because Dr. Stern had not done in the servicing anything active . . .
>
> * * *
>
> ". . . [A]ll the work that had to be done regarding IBM had to be done in Moscow where precisely I was. So I was the one contacting the necessary ministries, the necessary industries in the Soviet Union, and developing a relationship to be with IBM.
>
> * * *
>
> "[With respect to communications with IBM's New York offices:] If there were indeed any communications I suspect it would have been Mr. Giffen or perhaps, if the matter was more legal, it would have been Mr. Mott."

From this it seems clear that no work was required of, nor requested, of Dr. Stern. As a joint-venturer he had the right (and thought to profit) if he communicated to IBM those services Satra might perform for it and to Satra what technological opportunities it might be able to open to IBM in the Soviets (210A, 362-363A). And it was clear to everyone at Satra that Stern was expecting to use his time, as Oztemel remarked, to scout for further clients (792-793A, 858A), or gain income from other endeavors. In fact Giffen testified that Stern had always "wanted to do other projects outside of Satra . . ." (570A), and the original draft agreements between Stern and Satra were oriented towards a joint-venture concerning a number of companies (Exhibit A, E 2; Exhibit B, E 4).

B. Mitigation Principles Are Not Here Applicable.

As is spelled out in Stern's Main Brief (at 45ff) the rule of mitigation is only applicable where defendant shows a "but for" connection between the breach and plaintiff's income sought to be used in mitigation. It is *defendants' burden* to show that gains made by the injured party *after* the breach could not have been made had there been no breach. RESTATEMENT, CONTRACTS § 336, Comm. c (1932); 5 CORBIN, CONTRACTS § 1041 (1964).

Thus, where the plaintiff's opportunities to use or direct his talents are elastic, for example as a lawyer, engineer or other consultant, and he can clearly cope with many and varied clients or associates, the loss of one such client, or a breach by one, does not automatically indicate that *but for* that breach, the plaintiff could not have taken on another service contract or another job. *Weisberg* v. *The Art Work Shop*, 226 App. Div. 532, 235 N.Y.S. 8 (1st Dept.), *aff'd*, 252 N.Y. 572 (1929); *Carlisle* v. *Barnes*, 102 App. Div. 573, 92 N.Y.S. 917 (1st Dept. 1905); *Ritz* v. *Music, Inc.*, 150 A.2d 160 (Super Ct. Pa. 1959); *Grinnell Co.* v. *Voorhees*, 1 F.2d 693 (3rd Cir.), *cert. denied*, 266 U.S. 629 (1924).

Satra has tried to "explain away" these decisions, and cite others in their stead, but to no purpose. The cases cited by Satra, for the premise that moneys earned by a plaintiff on re-employment after breach will be applied to reduce his damages arising from the breach, all concern straight employment contracts. Thus in *Cornell* v. *T.V. Develop. Corp.*, 17 N.Y.2d 69, 268 N.Y.S.2d 29 (1966) the plaintiff who had been employed as defendant's general manager at $20,000 per year for a 5-year term sued for wrongful discharge. The Court of Appeals held that the employee's right to damages did not cease when he organized his own small corporation but he was still owed his contracted salary less what he could earn from his new

venture. In any event, plaintiff was a full-time salaried employee. Similarly in *Quinn* v. *Straus Broadcasting Group, Inc.*, 309 F. Supp. 1208 (S.D.N.Y. 1970) the plaintiff had been employed as a WMCA staff announcer for one year at a salary of $50,000 and the court considered his subsequent employment, at $30,000 a year by another radio station, to be a mitigation factor. *Howard* v. *Daly*, 61 N.Y. 362 (1875) is just an older case based on the same premise —defendant had breached plaintiff's one-year contract to work in a theatre group and since defendant had failed to prove that plaintiff could have secured other comparable employment, plaintiff was awarded the full value of her contract.

Satra also brings to this Court's attention the case of *Farmer's Fertilizer Co.* v. *Lillie*, 18 F.2d 197 (6th Cir. 1927) which case, far from supporting Satra, supports Stern's view as to mitigation. Lillie entered into a 5-year contract as sole Michigan agent for a fertilizer company and received a monthly draw against commissions. When defendant stopped filling Lillie's orders or advancing his draw, he sued for damages. Defendant, on appeal, objected to the trial court's rejection of evidence of Lillie's income subsequent to the breach by way of mitigation. The Sixth Circuit held that defendant was "*not* entitled to complain." Lillie did not devote his full time to this agency, but only his best efforts. He also owned and operated a farm; was an officer of a live-stock insurance company, two fire insurance companies, and a bank; had a position on an agricultural newspaper; and was president of a Live Stock Breeders Association. The court therefore stated that the question was not what he earned subsequent to the breach "*but what income he received as the result of relief from performance of the contract in suit . . .*" *ibid* at 200 (emphasis in original). Further the Court insisted that on *this* mitigation question, defendant had the burden of proof.

That is no more than what Stern claims in this case. Satra has never carried the burden, or proved that any income was received by Stern as a *result* of Satra's breach.

Satra has also sought to distinguish the cases cited in Stern's Main Brief. Thus much is made of a quotation, by way of dictum, taken from *Grinnell Co.* v. *Voorhees, supra.* But the general rule as to employment contracts there so cited (Satra's Answering Brief at 21) has no bearing on *Grinnell*, and has no bearing on Stern. *Weisberg* v. *The Art Work Shop* was obviously quoted correctly by Stern, but was so decided, Satra suggests (*ibid*), because "of the unique facts of that case". There was nothing "unique" about those facts—since they clearly parallel the facts in this case, and the rule applied in the former is applicable in the latter. As to *Ritz* v. *Music Inc., supra,* the question was not treated in the cavalier fashion suggested by Satra (Satra's Answering Brief, ftn. at 21): where the second employment in no way deterred performance of the first employment, mitigation was held *inapplicable.* And finally, in *Carlisle* v. *Barnes, supra,* the court truly did not address itself to the question of mitigation—it was completely inapplicable there, as here.

Carlisle was the attorney who lost a contingency client to another attorney and sued to recover his fee. The fact that Carlisle had available to him the time he would have spent in prosecuting defendant's claim was not considered pertinent, for a lawyer could have accepted a second, third and fourth client even though the first had remained. This is precisely the point being made for Stern.

The mitigation rule may apply to full-time on-staff employees, but cannot work for free-lance employees or self-employed professionals. The release of such professionals from one commitment does not automatically create the work-time enabling the assumption of other new com-

mitments. These professionals can service more than one client, more than one account, without the one pre-empting the other. This is so because consultants and other professionals make their own schedules and have the flexibility to service varied clients during the same time period.*

C. Satra Has Failed to Meet Its Burden of Proof.

Even assuming, arguendo, that a mitigation factor is applicable to Stern, Satra has failed to *prove* either

> 1. That the moneys Stern earned subsequent to Satra's breach were earned as a *result* of that breach (*i.e.* that "but-for" connection);
> or
>
> 2. That there was a savings to Stern in having been relieved from performance of his contract with Satra.

In support of this Satra claims that Stern (a) expected to spend a significant amount of his time commuting between Los Angeles, New York, and the Soviet Union, (b) requested two assistants to help him perform his work, (c) needed current income from Satra because he clearly was unable to maintain concurrent engagements and (d) was expected to do 50% of the work for 50% of the revenues.

Regardless of Satra's attempt at derision, Stern's argument that Satra thought Stern had no further obligations was established by Satra's evidence. From and after the date the IBM agreement was signed, Satra did not really use, or perhaps did not really know *how* to use, Stern's services. Whether Oztemel said (438A, 771A) that "there

*Further there is a serious logistic problem concerning a professional whose breaching client claims in mitigation four new clients who would, in *any* event, have retained the plaintiff. Can the defendant, who has the burden of proof, infer a "but-for" connection tying the new clients to plaintiff's *released* time, when no such connection in actuality exists?

was no performance required at that time" or "at any later time" is moot: no performance was ever required of Stern *after* the contract. Stern had the right to try to implement the contract and assist whenever called upon—but he was *never* called upon. Giffen recalled that nothing was ever said, when IBM was advised of the activities Satra could perform for it in the Soviet Union (559-560A), about what *Stern* was to do for IBM (561A). This statement was concurred in by IBM's Stafford (656A). In fact Stern clearly stated, Giffen recalled, "that he wanted to do other projects outside of Satra" (570A). Further, Giffen testified that Satra never precisely understood what Stern was going to do (571-572A), except that Stern would bring into being the contract between IBM and Satra (573A). This apparently was told to Satra's lawyer as well, for when Hanno Mott drafted the more formal agreement with which he wished to replace the Stern-Satra agreement it discussed Stern's services only in terms of having been instrumental in presenting to IBM the possibility that Satra could represent it in trade with the Soviet Union (Exhibit Z at E 53). Nowhere in any of the agreements, whether Stern's with Satra or Satra's with IBM, was there a specification of obligations and duties required of Stern. In fact, Satra deliberately tried, and almost succeeded, in keeping Stern away from IBM's introduction into the Soviet scene (579-582A, 659-660A). Clearly Satra was not interested in utilizing those services Stern could provide.

While it is true that Stern wanted assistants to help him in the technological work he fully expected to do on behalf of IBM and perhaps other Satra clients in the Soviet Union, he was quickly cut down in this request, and acceded without argument (712A). It is clear that Stern managed to do the very little work he was called on to perform without any assistance whatsoever. This, alone, would tend to prove and not disprove that Stern's obligations were at best nebulous.

And lastly, Stern's request for "current income" was not based on his inability to consult or engage to render services for other firms, but on the fact that he was not then maximizing those efforts because of the time he had spent originally on others of his clients and Satra's Kama River project, and then on the all-out effort to *secure* (which was different than maintaining) IBM as a client for Satra. Furthermore, as Oztemel so cooly testified, Stern had lost $250,000 the preceding year and had heavy interest payments to maintain (690).

Once Stern and Satra entered into the joint-venture, it was to Stern's immediate financial advantage to exert his every effort to make it profitable. He did so in securing IBM as a client; and he was willing, as he deemed it profitable, to exert further efforts when and if needed to do what was possible to facilitate IBM's entry into the Soviet Union. Specific duties on his part were never spelled-out; he was to exercise, as he said, his initiative to assist wherever he could to maximize sales and profits (362-363A). That neither Satra nor IBM saw any useful purpose for such initiative is not to gainsay its presence. Thus, for Oztemel to say that there was no performance required of Stern "at the time" (771A) was in reality to say "at the time *after* the IBM agreement was signed." And for Stern to have said that he "was to exercise *my* initiative to assist wherever called upon. . . ." (362-363A) is only to indicate that *he* had the option to determine when he was so called. In point of fact, Satra and IBM never even tried to make such call.

Thus, while Satra has secured copies of Stern's income tax returns, and has learned what income Stern has earned since the contract breach, and the source of such income, Satra has failed to prove the "but-for" connection that would make all or any part of that income subjet to mitigation principles. There has been no proof that Stern

would not have been able to earn such money even if Satra had not breached its contract or that Satra's breach *resulted* in gain to Stern—or that such gain was equal to 15% of his income.

It was Judge Lasker's finding that Stern would have spent 15% of his time on Satra's relationship with IBM (49A). There was not one scintilla of evidence produced at the trial on which this finding could have been based. As such, Stern claims error in the finding. Further Judge Lasker found that at the time of Satra's breach, December 1971, employment possibilities for high level executive consultants were such that "full employment was available to Stern" (49A). There is no evidence in the record to support this finding either. In fact, the Court could take judicial notice of the contrary based on national employment statistics especially among senior professionals, and the high rate of recent corporate failures.

Satra now asks for a remand to consider Stern's earnings subsequent to the trial. This misses the point completely. Not only are Stern's annual tax reports required to be made available to Satra for the 15% mitigation factor, but the point is not *what* Stern is earning (which Satra knows) but *whether* such earnings are relevant.

Satra argues that Stern's later earnings is the way to find mitigation—but that is not so; it is merely the way to calculate mitigation.

What Stern is protesting is the holding that mitigation principles apply, and that if they apply the findings that Stern would have devoted 15% of his time to the Satra-IBM relationship and that full employment was available to him from and after December 1971.

CONCLUSION

Satra's opposition brief is without merit. It is respectively asked that Stern's cross-appeal be granted.

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Respectfully submitted,

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